APPENDIX

FLORIDA GREENHEART CORPORATION,
Appellant,

v.

JOHN A. GAUTIER, Tax Assessor, et al.,
Appellee.

No. 33101.

Supreme Court of Florida.
March 3, 1965.

Rehearing Denied April 5, 1965.

* * * *

DREW, Chief Justice.

This direct appeal from a final decree of the Circuit Court of Dade County comes to us under Article V of the Florida Constitution, F.S.A. vesting jurisdiction here to review on appeal any decision of a trial court "construing a controlling provision of the * * * federal constitution."[1]

Florida Greenheart Corporation, a Florida corporation, appellant, is a Miami importer of pilings and sawn timber called Demerara Greenheart from British Guiana. In its complaint against the Tax Assessor and other tax officials of Dade County and the State of Florida, appellees, it sought to enjoin the imposition of tangible per-

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[1]The language of the questioned decree is " * * * that the plaintiff has not demonstrated an immunity from taxation pursuant to Article I, Section 10, Clause 2, of the Constitution of the United States as alleged, * * *."

sonal property taxes upon such greenheart, contending the assessment and imposition of such taxes was a tax upon import in violation of Article I, Section 10, Clause 2, of the Federal Constitution. It alleged that the individual pieces of greenheart were shipped by boat to appellant's storage yard in Dade County where they were unloaded, stacked according to existing orders or according to descriptions, and stored until sold without being altered in form, substance or character and without being mixed with any other property of any kind except other pieces of greenheart previously imported, stacked and stored as above stated, and that each of said pieces of greenheart is an import constituting an original package.

Appellees answered, denying the allegations of the complaint that the greenheart shipments of individual pieces were each imports immune from county tangible personal property taxation. Evidence was taken in the form of affidavits, exhibits and depositions upon the issues made by the pleadings.

The chancellor entered his final decree finding the equities with the taxing authorities and that the importer plaintiff did not demonstrate immunity of said piling and sawn timber from taxation pursuant to Article I, Section 10, Clause 2, of the Constitution of the United States.

To summarize, the chancellor found that at least some of the greenheart was " 'put to the use for which it was imported,' " and " 'mixed with the mass of local property' " " 'by having been offered for sale among the community at large;' " "that there was a 'breaking of bulk' " "in at least some of the shipments of 'Greenheart,' " that some of it was stacked in piles according to length, no effort

having been made to keep it separated as a unit of transportation or as to anticipated particular sales and it was offered for sale to the public; that the portion of the greenheart so stacked was commingled as to shipment and offered for sale to the public.

The chancellor conceded that any shipment of greenheart which may have been kept apart from other greenheart and maintained on plaintiff's property in the hope it might be sold to some particular purchaser may have retained its status as an import until sold; that under such circumstances it would not have been put to the use for which it was intended and there would have been no mixing with the mass of local property, and no offer of it for sale among the community at large nor breaking of bulk. But the chancellor said he was unable under the facts presented to separate the two categories discussed; that from the evidence 60 to 70 per cent of the greenheart brought to Dade County was in hopeful anticipation of some particular future need, but the chancellor could not glean from the evidence when and to what extent such greenheart materials were commingled with other shipments offered for sale among the general public.

The chancellor then stated the facts above summarized correspond closely with the factual situation in E. J. Stanton & Sons v. Los Angeles County, 78 Cal.App.2d 181, 177 P.2d 804, certiorari denied 332 U.S. 766, 68 S.Ct. 75, 92 L.Ed. 352. The chancellor said the E. J. Stanton & Sons case held in effect that the unit of transportation or importation was the original package, that such unit was broken and offered for sale to the general public and that it therefore passed the point where the prohibition to tax ceased. The chancellor also said he found no case which

holds that each piece of lumber is the "original package"; and that the Stanton case represents the law applicable to a situation where packaging is inherently impracticable.

[1] The decree of the trial court holds that the property is taxable apparently on the theory that the sale of any portion of a shipment, after being placed in stacks of uniform length upon unloading, constituted an alteration of the "original form or container" in which the property was imported, although such lumber was purchased by the importer, invoiced, and classified by customs service by board-foot measurement, and sold by appellant by the same unit without physical alteration of the pieces, each bearing individual identification stamped at the foreign point of origin of the shipment. That part of the shipment remaining in appellant's hands and held solely for sale was found to have been "put to the use" for which it was imported.

[2] It is impossible to reconcile this holding with our decision in Overstreet v. Frederick B. Cooper Co., Fla.1961, 134 So.2d 225, which dealt with certain imported canned meats from Europe. In that case the meat was imported in original cases and was stored in a warehouse where it was sold by the importer from time to time in the original unbroken cases. We held that the meats were not subject to local personal property taxes, holding: "Thus it appears that so long as personal property imported from a foreign country remains the property of the importer, in the original *form* or container in which imported, it retains its character as an import and is exempt from taxation by state or local authorities. * * * And the offering of the goods for sale by the importer does not subject them to taxation by the state."

[3] The chancellor in this case seems to attach great significance to the fact that after these logs and the heavy sawn timber were placed in the importer's warehouse or on his yard and thereafter sold, they ceased to enjoy the exemption. In this respect the chancellor said: "That portion of the greenheart so stacked and commingled as to shipment *and offered for sale to the public* had clearly passed that point where prohibition to tax ceases and the power of the state to tax commences. That merchandise had been put to the use for which it was imported." (Emphasis supplied.) It seems clear that what the chancellor is saying is that, when the importer offered the lumber for sale, it became subject to local taxation because of the fallacious reasoning that such was the purpose for which it was imported. This is not what the Constitution provides and the cases hold. On the contrary, in most instances the very purpose of importing is for resale. It is after the sale—where it is sold in the original form or package—that it becomes taxable by local authority.

[4] Moreover, another fallacious assumption is the significance given by the chancellor to the words "original package." Where this expression has been used in the cases, it has been used in juxtaposition with the words "original form." This was the language used more than 100 years ago in the early case of Brown v. State of Maryland by Justice Marshall, 12 Wheat. 419, 25 U.S. 419, 6 L.Ed. 678. The cases since have held that the exemption attaches to the sale in the original form or the original package . Obviously in imports of articles of great size such as this greenheart timber, or perhaps immense mahogany logs or large pieces of machinery, to confine the exemption to the original *package* idea would be to deny

the exemption to articles of personal property solely because of its form or size.

[5] In this case the original package idea is carried to the point of holding that the ship or cargo itself constitutes in some manner the original package, although the record reflects that appellant's shipments were invariably brought by boats bearing numerous consignments for other ports. The chancellor relied upon E. J. Stanton & Sons v. Los Angeles County, supra, which held that lumber of different shipments, although stacked separately in the importer's storage yard, was taxable as soon as one piece of it was sold; i.e., when the original package (the shipload) was broken. We cannot agree with this conclusion, even if it were the result reached by the California court, for three reasons: first, it ignores the original form concept; second, it is directly contrary to our holding in Overstreet v. Frederick B. Cooper, supra; and, third, it goes counter to cases such as those which hold cotton in bales, kegs of nails, barrels of chains, rolls of cloth, disks in crates, wine in packages and similar items enjoy the exemption.[2]

[6] If the evidence in this case showed that a few logs of greenheart were imported by a dealer in domestic and other piling and promiscuously mixed with such other piling and sold to the public when so commingled, we think then it would fall within the rationale of those cases which hold that when the original package is broken or the articles commingled with the general property of the

[2]Low v. Austin, 13 Wall. 29, 80 U.S. 29, 20 L.Ed. 517; Imperial Development Co. v. City of Calexico, 47 Cal.App. 666, 191 P. 50; Simon v. County of Los Angeles, 141 Cal.App.2d 74, 296 P.2d 381.

state it loses its status of exemption under the applicable constitutional provision.

There are numerous cases holding that minerals imported in bulk, phosphate imported in bags, oil imported in bulk do not lose their status as being exempt merely by virtue of their form.[3] We cannot see, and the record does not disclose, how it would be possible physically to make packages out of this personal property. We hold that under all of the cases with the possible exception of the Stanton case, which is directly contrary to our holding in the Overstreet case, this property under the facts disclosed by this record enjoys immunity from taxation under the Constitution.

Reversed and remanded for the entry of a decree in accordance with the views herein expressed.

THORNAL, O'CONNELL, CALDWELL and HOBSON (Retired), JJ., concur.

ERVIN, J., dissents with opinion.

ROBERTS, J., dissents and agrees with Ervin, J.

ERVIN, Justice (dissenting):

My study of the authorities leads me to the conclusion that we should affirm the decision of the chancellor. Furthermore, from a consideration of the evidence I agree with the chancellor and the appellees that many of the greenheart timbers on appellant's storage yard

[3]Anglo-Chilean Nitrate Sales Corp. v. State of Alabama, 288 U.S. 218, 53 S.Ct. 373, 77 L.Ed. 710. 58 Harvard Law Rev. 858.

were offered for sale and sold piecemeal to the general public. In reaching the conclusion we should affirm, I believe the rule announced in E. J. Stanton & Sons v. Los Angeles County, 78 Cal.App.2d 181, 177 P.2d 804, certiorari denied 332 U.S. 766, 68 S.Ct. 75, 92 L.Ed. 352, is correct that a shipment or cargo of timbers received by an importer constitutes the unit of importation in the sense of the original package and when the timbers are offered for sale and sold piecemeal or as separate items to the general public the package is broken and the immunity from local taxation no longer obtains. In so doing, the contention is rejected that each piling or piece of sawn timber of the greenheart constitutes an original package because of its unique or inherent nature, rendering it incapable of being packaged for shipment with other like pilings or timbers of greenheart.

E. J. Stanton & Sons v. Los Angeles County, supra, reads in part:

> "* * * A cargo of planks, timbers or logs imported from foreign lands is surrounded by the invisible gossamer woven of law, custom and convention which protects the merchandise from the local tax assessor only so long as it retains the unbroken wrapper in which it entered the port. But when such cargo sheds its invisible cover, even though in the warehouse of the importer, and is so sorted and classified as to facilitate its sale, and portions thereof are sold until the pile is depleted and the remnants thereof are commingled with new shipments of the same type of timbers, also to be offered for sale, then a reasonable construction of section 10 and the de-

cisions which have interpreted its meaning compel the termination of immunity from local taxation of such broken lots and commingled remnants of imported lumber.

"The circumstances attending the shipments in question are additional reasons for concluding that the several boards or timbers were not original packages. (1) Lumber is universally bought and sold by board feet; (2) the United States Customs' method of classification of lumber is by board feet; (3) the price paid by respondent for its shipments is determined by board feet except in the purchase of lignum vitae logs; (4) the consular certificates of origin describe the shipments by board feet, grade and variety; (5) the absence of an address from each board and the manner of transporting the lumber as an aggregation of goods,—these facts establish the folly of calling each plank an original package, and of designating the segregated and classified lumber in the bins to be in the 'original form' in which it was shipped." 177 P.2d 804, 807, 808.

If this were not the rule, discrimination in the impact of local taxes disadvantageous to fair competition in the building supply business in our communities would result. In this respect, attention is directed to the views expressed by the United States Supreme Court in the case of F. May & Company v. City of New Orleans, 178 U.S. 496, 20 S.Ct. 976, 44 L.Ed. 1165, which appear analogously to apply in principle to this case.

The Court said:

> "In our judgment, the 'original package' in the present case was the box or case in which the goods imported were shipped, and when the box or case was opened for the sale or delivery of the separate parcels contained in it, each parcel of the goods lost its distinctive character as an import and became property subject to taxation by the state as other like property situated within its limits. * * * We cannot impute to the framers of the Constitution a purpose to make such a discrimination in favor of property imported from other countries as would result if we approved the views pressed upon us by the plaintiffs. When their goods had been so acted upon as to become a part of the general mass of property in the state the plaintiffs stood, with respect to liability to state taxation, upon the same basis of equality as the owners of like property, the product of this country; * * *."

In Hinson v. Lott, 8 Wall. 148, 75 U.S. 148, 19 L.Ed. 387, the United States Supreme Court, in discussing the landmark case Brown v. State of Maryland, 12 Wheat. 419, 25 U.S. 419, 6 L.Ed. 678 (1827), said with regard to foreign imports in the hands of the importer:

> "* * * As soon as they passed out of his hands into use, *or were offered for sale among the community at large, they would be liable to a tax* which might render their use or sale impossible." (Italics supplied.)

Appellant's contention that the later California case of Simon v. County of Los Angeles, 141 Cal.App.2d 74, 296 P.2d 381 (1956), reversed or greatly modified E. J. Stanton & Sons v. Los Angeles County, supra, does not appear to be correct, because in the Simon case the California Court said that E. J. Stanton & Sons, supra: "[U]ndoubtedly represents the law applicable to a situation where packaging is inherently impossible or impracticable," but "the Stanton case does not control imports which actually are in packages" as was the situation in the Simon case. The same distinction made in the Simon case applies as between the instant case and Overstreet v. Frederick B. Cooper Co. (Fla. 1961), 134 So.2d 225.

The anomalous nature of the majority opinion in the case is further demonstrated by reference to 51 Am.Jur., pages 140 and 141, where it is stated:

> "The doctrine under consideration loses most of its meaning when it is sought to be applied to certain kinds of property. Thus, an individual cow or steer or an entire herd of cattle, transported into a state from a foreign country on the hoof is in no sense of the term to be placed in the category of an 'original package,'[1] and if cattle should be transported from a foreign country into a state by train or truck, and each such car or truck should be regarded as an 'original package,' the cattle would lose their status as imports as soon as they were unloaded from from the train or trucks.[2] If, where oil is imported into

[1]Tres Ritos Ranch Co. v. Abbott, 44 N.M. 556, 105 P.2d 1070, 130 A.L.R. 963.

[2]Ibid.

the country in tank cars or tank steamers, the cars and boats may be regarded as 'original packages,' then such packages are broken and the character of the oil as an import ceases when it is pumped from the cars or boats and stored in tanks within the state, and thereafter the imports and exports clause offers no objection to state taxation.[3] With respect to property of this kind the determining factor in deciding whether the property has lost its status as an import and hence become subject to state taxation under the imports and exports clause appears to be whether it has become mingled with other property in the state.[4] The foregoing test has been followed even where the ranch on which cattle were kept after their importation was designated by the Secretary of the Treasury as a private bonded warehouse for customs purposes.'"[5]

and to 15 Am.Jur.2d, Commerce, § 45, which reads as follows:

"Although many and varying definitions have been given, the general gist of the decisions is that an 'original package' is that package which, according to custom respecting the particular articles shipped, is usually delivered by the vendor to the carrier for transportation and delivered as a unit to the consignee. It is the package, as a unit, which is delivered by the shipper to the carrier at the initial place of shipment in the exact

[3]Mexican Petroleum Corp. v. City of South Portland, 121 Me. 128, 115 A. 900, 26 A.L.R. 965.

[4]Ibid.

[5]Ibid.

condition in which shipped.[6] Upon the question what is an 'original package,' it is immaterial whether the package is suitable for wholesale or retail trade or whether it is shipped to a dealer or to a consumer.

"Where an aggregation of articles or packages is, for convenience in shipping, packed and shipped in a larger package or receptacle, the larger package or receptacle, and not the individual articles or packages, constitutes the original package, even though the larger receptacle is unfastened or uncovered. Where the car or vessel itself constitutes the receptacle or container in which the commodity is transported, the car or vessel, together with the contents, constitutes the original package. However, there is authority that where goods are shipped in carload lots, packed in cases, casks, or sacks, the cases, casks, or sacks, are the original packages and not the car.

"In cases where packaging is inherently impossible or impracticable, as where lumber which is not fastened together in any way is imported, the 'aggregation of articles imported' has been held to constitute, in legal concept, an original package.[7] However, there is also authority to the effect that the 'original package' doctrine is in-

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[6]E. J. Stanton & Sons v. Los Angeles County, 78 Cal.App.2d 181, 177 P.2d 804, cert. den. 332 U.S. 766, 68 S.Ct. 75, 92 L.Ed. 352; McGregor v. Cone, 104 Iowa 465, 73 N.W. 1041, 39 L.R.A. 484; Re: Agnew, 89 Neb. 306, 131 N.W. 817, 35 L.R.A.,N.S., 836.

[7]Simon v. Los Angeles County, 141 Cal.App.2d 74, 296 P.2d 381.

applicable in a situation where packaging is impossible. Thus, the doctrine has been held inapplicable to imported cattle, since neither an individual cow, nor a herd, nor a stock car in which the cattle are transported, constitutes an original package."[8]

I believe the weight of authority supports an affirmance of the decree below.

ROBERTS, J., concurs.

[8]Ibid.

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM A.D. 1965

MONDAY, APRIL 5, A.D. 1965

CASE NO. 33,101

FLORIDA GREENHEART CORPORATION, a Florida corporation,

Appellant,

-vs-

JOHN A. GAUTIER, TAX ASSESSOR, ET AL,

Appellees.

On consideration of the Petition for Rehearing filed by Attorney for Appellees,

IT IS ORDERED by the Court that said petition be, and the same is hereby, denied.

A TRUE COPY,
TEST:
SID J. WHITE
CLERK SUPREME COURT

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA. IN CHANCERY. No. 60C 8506 - Eaton

FLORIDA GREENHEART CORPORATION, a Florida corporation,
Plaintiff,

-vs-

JOHN A. GAUTIER, Tax Assessor, et al.,
Defendants.

FINAL DECREE

THIS CAUSE, upon due notice, having come on for final hearing, and having heard argument of counsel for the respective parties and after reviewing the law and considering the pleadings, evidence and exhibits, the Court finds that the equities are with the defendants and against the plaintiff; that the plaintiff has not demonstrated an immunity from taxation pursuant to Article I, Section 10, Clause 2, of the Constitution of the United States, as alleged, nor that the assessed value is illegal or void.

It is clear that at least some of the "Greenheart" was "put to the use for which it was imported" (see *Youngstown Sheet and Tube Co. v. Bowers*, 3 L.Ed2d 470, and *Hooven & A. Co. v. Evatt*, 324 U.S. at p. 657) and "mixed with the mass of local property" (see *Brown v. Maryland*, 6 L.Ed 678) "by having been offered for sale among the community at large" (see *Hinson v. Lott*, 19 L.Ed. 387). It is also clear that there was a "breaking of bulk" (see

Stanton and Sons v. Los Angeles County, 177 P.2d 804, and 58 Harvard Law Review 858) in at least some of the shipments of "Greenheart."

It is undisputed that some of the "Greenheart" which is the subject of this levy was stacked in piles according to length (p. 21 of the deposition of J. E. Jacks in evidence), no effort having been made to keep it separated as to unit of transportation or as to anticipated particular sales, and it was offered for sale to the public (pp. 10 and 15 of the Jacks' deposition). That portion of the "Greenheart" so stacked commingled as to shipment and offered for sale to the public had clearly passed that point where prohibition to tax ceases and the power of the state to tax commences. That merchandise had been put to the use for which it was imported.

It may be that some of the "Greenheart" upon which levy was made had in fact not passed that critical point. It occurs to the Court that any shipment of this material which may have been kept apart from the other "Greenheart" and maintained on the plaintiff's property in hopes that it might be purchased by some particular purchaser (see pp. 11 and 12 of the Jacks' deposition) may in fact have retained its status as an import until such time as the hoped for transaction may have been accomplished. Under those circumstances it would neither have been put to the use for which it was intended, mixed with the mass of local property, nor offered for sale among the community at large. Further, there would have been no breaking of bulk. However, the Court is unable, upon the facts presented, to separate the material into the two categories discussed above. We learn from the evidence that 60 or 70 percent of the "Greenheart"

brought into Dade County was brought here in hopeful anticipation of some particular future need, but we cannot glean from the evidence when and to what extent such materials were commingled with other shipments, offered for sale among the general public, etc.

It is the plaintiff who seeks to have this Court enter its injunction and to have this Court cancel the levy from the records. Therefore, the Court must deny the plaintiff the relief he seeks in this cause.

It seems to me that Stanton and Sons v. Los Angeles County, supra, comes closer to corresponding to the facts in our instant case than does any other authority which is available to us. The facts in that case are set out in detail in the body of the opinion.

Stanton and Sons contended that so long as any parcel of the entire lot remained in its possession it was not subject to taxation prior to sale; that each board was marked so as to distinguish it from others and was therefore in itself an original package. Los Angeles County argued that by sorting, segregating, and selling from the cargos received and by offering for sale the remainder, the lumber became a part of the mass of property in the county and subject to taxation.

The lower court held that the lumber was exempt from local taxation. The California Second District Court reversed on appeal. The Supreme Court of California refused a hearing thereafter and the United States Supreme Court denied certiorari (332 U.S. 766, 68 C.Ct. 75, 92 L.Ed. 352).

The Stanton case therefore appears to me to be consistent with the authorities cited in this Court's order denying plaintiff's motion for summary decree. It is persuasive authority for the ruling in our instant case. That case held in effect that the *unit of importation* was the original package, that the unit of transportation was broken and offered for sale among the general public, that it therefore passed the point where the prohibition to tax ceased. This Court has located no case, except the now "defunct" Dant case (*Dant & Russell, Inc., v. Board of Supervisors of Los Angeles County*, 128 P.2d 389 [1942]) which holds that each piece of lumber is the "original package." The holding in the Dant case has been abandoned by the Court which wrote it (see *Stanton and Sons v. Los Angeles County*, supra).

Incidentally, the Stanton case would not be controling in cases regarding imports which actually are in packages. (See *Simon v. County of Los Angeles*, 296 P.2d 381). The Stanton case represents the law applicable to a situation where packaging is inherently impossible or impracticable.

In view of the plaintiff's inability to affirmatively establish that any particular portion of the material on its property in Dade County remained imports at the time of the levy and it affirmatively appearing that the immunity from local taxation was terminated by the utilization of the "Greenheart" as detailed above, this material stood at the time of the levy in no different position from that of lumber brought into this state in carload or shipload lots, placed into piles by length in a lumber yard and offered for sale among the general public.

It is, therefore, ORDERED, ADJUDGED AND DE-

CREED that the plaintiff's complaint be and the same is hereby dismissed with prejudice to and at the cost of the plaintiff.

DONE AND ORDERED in Chambers, Miami, Dade County, Florida, this 3rd day of October 1963.

JOE EATON
Circuit Judge

FLORIDA GREENHART CORP. v. TAX ASSESSOR, et al.

No. 60-C-8506.

Circuit Court, Dade County.
July 26, 1962.

* * *

JOE EATON, Circuit Judge.

This cause came on to be heard on plaintiff's motion for summary final decree. The court heard argument of counsel for the parties and has considered the record in this cause, including affidavits filed on behalf of plaintiff.

It is the plaintiff's position that there is no genuine issue of material fact raised in this record to challenge its position that certain of its goods (in 1959 and 1960) were imports, and thereby are immune from taxation by the defendants by virtue of article I, section 10, of the consti-

tution of the United States. It is the opinion of the court that the plaintiff should not prevail upon the motion.

The subject goods were imported. The principal issue of fact raised by the record here is whether or not the goods had been put to the use for which they were imported—or, stated otherwise, had the plaintiff so acted upon the imported materials as to have caused them to have lost their distinctive character as imports. Embraced within the principal issue is the question—"Did the goods remain in the form in which they were imported or were they mingled with the mass of local property?"

The foundation case in this area of the law is Brown v. Maryland, 6 L. Ed. 678. Mr. Justice Black (in his dissenting opinion in Hooven & Allison Co. v. Evatt, 65 Sup. Ct. 870, April 9, 1945) notes that Brown v. Maryland has been narrowly restricted, but he agrees that "it has been, and still is, the general rule of decision in this Court, as regards imports for sale from foreign countries."

Thomas Reed Powell, Story Professor of Law, Harvard Law School, the author of *"State Taxation on Imports—When does an import cease to be an import?"* 58 Harvard Law Review, 858, writes in that article that the view expressed in Brown v. Maryland was that immunity lasted until sale, or use, or breaking bulk. In the absence of sale or breaking bulk, immunity continues, he says, until use begins.

In Brown v. Maryland, Chief Justice Marshall, speaking for the Court, declared that goods do not cease to be imports upon arrival at their destination, but he recognized "that there must be a point of time when the prohi-

bition [to tax] ceases and the power of the state to tax commences." In indicating the dividing line he said—

> "It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports, to escape the prohibition in the constitution."

Therefore, attention to this area of the law inevitably leads one to the "original package doctrine." Footnote 1 of the "Separate Opinion" in Youngstown Sheet & Tube Co. v. Bowers, 3 L.Ed.2d 470, explains—

> "Although the principles of Brown v. Maryland are often termed the 'original package doctrine,' Marshall was concerned with a 'package' only because the statute in that case taxed the selling of goods in their original packages. 12 Wheat at 436 and 443. Marshall himself is careful to use the phrase, 'form or package,' 12 Wheat at 442, and Mr. Chief Justice Taney, in his reformulation of Brown v. Maryland, used the characterization 'form and shape.' See p. 56, infra. 'It is a matter of hornbook knowledge that the original package statement of Justice Marshall was an illustration, rather than a formula, and that its application is

> evidentiary, and not substantive, . . . City of Galveston v. Mexican Petroleum Corp. 15 F.2d 208.' "

The language contained in that footnote was derived from the following language several times employed by Mr. Justice Cardozo—"The rule of 'original package' is not an ultimate principle, it is an illustration of a principle."

Whatever may be the significance of retaining in the "original package" goods that have been imported for sale, we are advised in the majority opinion of the Youngstown case, supra—

> " . . . goods that have been so imported for use in manufacturing are not exempt from taxation, though not removed from the 'original package,' if, as found here, they have been 'put to the use for which they [were] imported.' Hooven & A. Co. v. Evatt, supra (324 U.S. at 657). Breaking the original package is only one of the ways by which packaged goods that have been imported for use in manufacturing may lose their distinctive character as imports. Another way is by putting them 'to the use for which they [were] imported.' Id. That the package has not been broken is, therefore, only one of the several factors to be considered in factually determining whether the goods are being 'used for the purpose for which they [were] imported.' "

Mr. Justice Frankfurter, in his "Separate Opinion" which recorded his dissent on the main issue in Youngs-

town, reasoned (footnote 12, p. 509) that Brown v. Maryland denied immunity to goods which had been brought in and thereafter actively used by the importer.

The majority opinion in Hinson v. Lott, 19 L. Ed. 387, interprets Brown v. Maryland as having established that "it is only while the goods so imported were held in the original unbroken condition in which they came into the State, and in the hands of the first importer, that they would be protected from state taxation. As soon as they passed out of his hands into use, or were offered for sale among the community at large, they would be liable to a tax which might render their use or sale impossible."

In Brown v. Maryland, counsel for the state of Maryland had endeavored to illustrate their proposition (that the constitutional prohibition to tax imports ceases the instant the goods enter the country) by "an array of consequences which they suppose must follow the denial of it" (that proposition). Referring to counsel's illustrations, the great author of the opinion of the Court in that case wrote—

> "This indictment is against the importer, for selling a package of dry goods in the form in which it was imported, without a license. This state of things is changed if he sells them, or otherwise mixes them with the general property of the state, by breaking up his packages, and traveling with them as an itinerant peddler. In the first case, the tax intercepts the import, as an import, in its way to become incorporated with the general mass of property, and denies it the privilege of becoming so incorporated until it

> shall have contributed to the revenue of the state. It denies to the importer the right of using the privilege which he has purchased from the United States, until he shall have also purchased it from the state. In the last cases, the tax finds the article already incorporated with the mass of property by the act of the importer. He has used the privilege he had purchased, and has himself mixed them up with the common mass, and the law may treat them as it finds them."

It is left for the court to decide, by the taking of testimony in this case, whether or not the plaintiff has drawn the "dividing line" as outlined by Chief Justice Marshall in Brown v. Maryland.

Therefore, it is ordered, adjudged and decreed that plaintiff's motion for summary decree be and the same is hereby denied.

* * *

The law on this question appears to me to be now reasonably discernible from an analysis of the United States Supreme Court's treatment of the subject. Any confusion that may exist stems from the decisions of the Second District Court of Appeal of the State of California. A close comparison of the three cases from that court hereinafter cited clears the confusion to some extent. By close comparison we are able to discover how that court applied the "original package" doctrine in factual circumstances where goods were literally packaged and its treatment of the doctrine where such literal packaging of the goods by the shipper or importer was "impracticable."

In Dant & Russell, Inc. v. Board of Supervisors of Los Angeles County, 128 P.2d 389 (1942), we are told—"The fact that a portion of shipments of goods is sold or offered for sale, leaving the remainder intact in their original packages does not make the balance subject to state taxation." (Counsel should note the citations following that statement on p. 391 of Dant.) The Dant case involved lumber shipped in individual pieces, stacked in piles, one piece upon another, each shipment having been filed separately and kept to itself. The question before the court in the Dant case seems to have been whether or not the goods had been mingled with the mass property of the state. Dant held that they had not been so mingled. It held, in effect, that each piece of lumber was the original package. However, the court abandoned that position five years later.

E. J. Stanton & Sons v. Los Angeles County, 177 P.2d 804 (1947), involved pieces of imported lumber. (The factual situation present in the Stanton case is set out in considerable detail in the opinion. Suffice it to say, the facts are not far removed from the facts in the Dant case.) The respondent relied on the Dant case. The California District Court of Appeal said, however, that the California Supreme Court had "blacked out" the court of appeal's opinion in the Dant case though the California Supreme Court's ruling was predicated upon another theory. The Second District Court was careful to point out that the application for hearing before the California Supreme Court in the Dant case was based upon the county's claim that each piece of lumber in the cargo was not an original package. Therefore, it reasoned, the Dant case was no longer of authoritative value. It was referred to as "our defunct decision."

The Stanton case held, in effect, that the *unit of transportation* is the original package. (The Dant decision was either "blacked out" or the Second District "backed off.")

The case of Simon v. County of Los Angeles, 296 P.2d 381, involved building materials and supplies, mostly nails, all such supplies apparently having been literally "packaged." (The factual situation regarding method of storage and sale is set out in detail in the body of the opinion.) Simon (and other taxpayers) argued that each such keg, roll, etc., was in its original package and not locally taxable. The county confidently argued that each shipment in the aggregate was the package, or its legal equivalent, relying upon the Stanton case. The trial court agreed with Simon and the Second District Court of Appeal affirmed. In its reconciliation (or attempted reconciliation) of the Stanton case with the holding in the Simon case, the court (in the Simon case) wrote that Stanton "undoubtedly represents the law applicable to a situation where packaging is inherently impossible or impracticable." But, it said, "the Stanton case does not control imports which actually are in packages." There was no mention of the "defunct decision" of the Dant case in Simon.

E. J. STANTON & SONS v. LOS ANGELES COUNTY et al.

Civ. Nos. 15469-15471.

District Court of Appeal, Second District, Division 2, California.
Feb. 20, 1947.
Hearing Denied April 17, 1947.

* * *

MOORE, Presiding Justice.

The question involved is whether respondent as importer had so treated certain taxed lumber as to incorporate it into the mass of property in this state thereby removing it from the inhibition of the federal constitution against a state's assessing duties on imports.

The three judgments appealed from resulted from three actions to recover taxes paid under protest on several lots of lumber in possession of respondent on the first Monday in March of 1939, of 1940 and of 1941 to H. L. Byram, the county tax collector of Los Angeles county who was on the date of each payment agent for the city of Los Angeles for the purpose of collecting taxes. Since the rates of assessments and the question of the city's obligation to pay the total amounts sued for are not pertinent to this decision further mention thereof will not appear. The justice of the taxes will appear from the record in the light of the authorities.

Respondent has been for 50 years engaged in the

wholesale and retail lumber business in Los Angeles county. One of its activities has been the importation of hardwoods from Central and South American republics, Australia, the Philippines and other oriental lands. Its method of handling the shipments of such lumber brought on the situation which induced the assessor to tax the lumber remaining in the stocks after being depleted by sales therefrom. As a shipment was unloaded by crane at the Inner Harbor Terminal Dock at Los Angeles Harbor the lumber was transported by Ross carrier to respondent's storage yard near the dock. There the pieces were segregated and stacked according to thickness, color, trade and type from the same mill. Lumber of different shipments was kept separate. After being so placed in the storage yard the lumber was tallied by counting the various stacks to ascertain the dimensions and "board measure of the different lumber." No change whatsoever was made in any piece in these stacks after receipt of it and prior to sale. From time to time sales were made from the stacks in the yard, prior to the tax dates, while at the same time no taxes were ever levied upon intact cargoes. Only the "broken lots" remaining after sales had been made from a cargo were taxed. Some of these remained on respondent's premises at the harbor, while others were transported to its yard at Vernon where it was "detailed to various bins" in which it was stored after being tallied and sorted. By the method long in use by respondent each shipment is placed in a separate bin where it is segregated for color and thickness. All lumber is measured by board feet except lignum vitae which is measured by weight. It is stacked with laths between the layers of lumber to preserve it from fungus and rot and not to process it. It is not kiln-dried prior to sale. The taxed lumber, says re-

spondent, consisted of "portions of shipments remaining after sales by plaintiff of portions of the original shipment * * * all lumber was kept in piles where only lumber from one shipper was present. * * * The bin depleted by sales is filled by the addition of more of the same type of lumber from the same importer. * * * Lumber is sold from these bins by a carload, a truckload or several carloads. The number of sales from any particular bin varies from a few to a single sale." Such was substantially the stipulation at the trial.

The controversy revolves about the question whether upon the sale of a portion of a shipment the remainder becomes subject to taxation. Respondent contends that so long as any parcel of the entire lot remains in the possession of the importer it is not subject to state taxation prior to sale; that each parcel or board is marked so as to distinguish it from all others and is therefore in itself an original package. Appellants argue that by the sorting, segregating and tallying of the timbers, and by virtue of sales from the cargoes received, the remainder being offered for sale becomes a part of the mass of property in the county and subject to taxation. As proof of the incorporation of the remnants of shipments into the mass of the county's property it was developed that it might be a number of years before a particular cargo is entirely sold out, and if a few odd pieces are left in a bin a new shipment of the same type from the same producer is put into the same bin.

The law governing the exemption of importations from local taxation had its genesis in section 10 of Article I of

the organic law of the United States.[1] The inhibition against a state's assessment of imports for taxation was the result of the long period of conflict among the newly liberated states in their endeavor to maintain a union and at the same time to preserve the state in its pristine vigor. To achieve these ends under the new government section 10 was made a part of the constitution forbidding a state to lay imposts or duties on imports. Because of the brevity of the inhibiting clause controversies readily developed with the result that the decision of Brown v. Maryland, 12 Wheat. 419, 1827, 6 L.Ed. 678, first held that "while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported," an import is not taxable by the state. In that decision, which is a landmark in the development of nationalistic trends, some pronouncements were made that still must guide the courts in dealing with the fundamentals of taxation, namely: (1) a duty on imports is a tax on the article which is paid by the consumer; (2) the object of importation is sale which is the motive for paying the duties; (3) the tax by the state finds the article already incorporated with the mass of property by the act of the importer; (4) when by the act of the importer the import has become incorporated with the mass of property in the state it loses its distinctive character as an import and becomes subject to the taxing power of the state; (5) while the import remains the property of the importer, in his warehouse, in the original form or package in which it was im-

[1]Article I, section 10, clause 2: No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws; and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

ported, a tax upon it by the state is too plainly a duty on imports to escape the constitutional inhibition against taxing imports.

Subsequent decisions and text writers have followed the construction of Brown v. Maryland and have further clarified section 10 as well as the language of the Chief Justice. The meaning of his phrase "original form or package" is determinative of the instant contest. While respondent says each board is a separate package and is in its original form, appellants contend that the package of lumber is the bulk transported in the ship's hold. In this they are generously supported. The article in Corpus Juris Secundum (15 C.J.S., Commerce, § 28, page 310) declares that imports become subject to state regulation when the larger receptacle is broken for the purpose of selling and delivering the smaller units, and that they are no longer in the original package when they are sold; that an original package is an aggregation of goods put up in whatever form, covering or receptacle for transportation and as a unit transported. The import is subject to state taxation if the container is opened and smaller packages removed therefrom are offered for sale, or if the recipient of the package has an unexecuted intention to open it and sell its contents. (11 Am.Jur., p. 56, §§ 60, 62.) A large box containing bundles or parcels is the original package and when opened each parcel loses its character as an import, becomes a part of the general mass of property and is subject to local taxation. F. May & Co. v. New Orleans, 178 U.S. 496, 20 S.Ct. 976, 44 L.Ed. 1165, 1170.

[1, 2] The legal concept of "original package" is an aggregation of articles imported. The purpose of wrapping the articles ordinarily found in a package is to unify them

as a single import and to prevent their loss or destruction. When removed from the wrapper they cease to be imports and become a part of the property mass of the state. The term "original package" is generally applied to a bundle or box " 'packed' with some commodity with a view to its safety and convenient handling in transportation * * * It does not necessarily mean that goods shall be inclosed in a tight or sealed receptable * * * It relates wholly to goods as prepared for transportation, and has no necessary reference whatever to the package originally prepared or put up by the manufacturer." Cook v. Marshall County, 119 Iowa 384, 93 N.W. 372, 373, 374, 104 Am. St.Rep. 283. Indeed such articles of commerce as steel beams, threshing machines, telegraph poles and many others might be cited as illustrative of classes of imports that are incapable of being wrapped in cellophane or encased in wooden or steel crates. Although they might arrive at the dock without cover, nevertheless a shipment of such articles constitutes the original form or the original package. Such articles as those last mentioned, or lumber as in the instant case, require neither bundling to facilitate their handling nor wrappers to protect them from the elements. Indeed, to bundle timbers would impair the facility of handling a shipment. The phrase "original package" refers to the unit transported by the shipper and delivered in the exact condition in which it was shipped. McGregor v. Cone, 104 Iowa 465, 73 N.W. 1041, 39 L.R.A. 484, 65 Am. St.Rep. 522. As governed by interstate commerce rules the original package retains its form and contents until received by the consignee in the same condition as when shipped, but ceases to be original when broken for sale of its smaller units. In re Agnew, 89 Neb. 306, 131 N.W. 817, 35 L.R.A.N.S., 836, Ann.Cas.1912C, 676. It is an aggregation of goods put up in whatever form and as a unit trans-

ported from a foreign land to our shores, or from one state to another. Austin v. State, 101 Tenn. 563, 48 S.W. 305, 50 L.R.A. 478, 70 Am. St. Rep. 703; 26 A.L.R. 971, 974.

[3] While no reported case involves the classification of a cargo of lumber, some light may be shed upon it by the adjudication as the original package of sealed cases of beer (Leisy v. Hardin, 135 U.S. 100, 10 S.Ct. 681, 34 L.Ed. 128); casks containing a dozen bottles of tonic (Purity Extract & Tonic Co. v. Lynch, 226 U.S. 192, 33 S.Ct. 44, 57 L.Ed. 184); crates containing 20 pails each of lard (State v. Armour & Co., 240 U.S. 510, 36 S.Ct. 440, 60 L.Ed. 771, Ann.Cas.1916D, 548); packages containing two or more five gallon cans of gasoline (Askren v. Continental Oil Co., 252 U.S. 444, 40 S.Ct. 355, 64 L.Ed. 654); packages containing three or more barrels and crates enclosing bottles of liquor (Guckenheimer v. Sellers, C.C., 81 F. 997). An open box holding bottles of liquor is an original package in interstate commerce. Collins v. Hills, 77 Iowa 181, 41 N.W. 571, 3 L.R.A. 110. In an action to enjoin a newsdealer from selling a certain publication prohibited from sale it was held that when the newspapers were received by the defendant in bulk or in bundle and placed on the newsstand for sale they became commingled with the mass of property in the state. State Ex rel Black v. Delaye, 193 Ala. 500, 68 So. 993, 995, L.R. A.1915E, 640. Even though a large receptacle is uncovered, leaving exposed the individual articles such as bales, cartons, crates and cases of dry goods which constitute the shipment, still such receptacle is the original package in contemplation of the constitutional restraint upon local taxation of an import. (11 Am.Jur., p. 55, § 60.) The fact that one article in a cargo could be shipped alone does not for that reason

render each item in such a shipment a separate, original package. In re Harmon, C.C., 43 F. 372.

[4] From the authorities above quoted the conclusion is irresistible that the unit of importation is the original package; that such unit only and not its constituent elements is within the exclusive federal jurisdiction. Although a cargo in bulk may arrive at the port of entry in irons, or wrapped and tied with hemp ropes, or encircled with a silken thread or, as a herd of steers, have no binder at all, yet the entire shipment without regard to its exterior wrapper is the original package. A cargo of planks, timbers or logs imported from foreign lands is surrounded by the invisible gossamer woven of law, custom and convention which protects the merchandise from the local tax assessor only so long as it retains the unbroken wrapper in which it entered the port. But when such cargo sheds its invisible cover, even though in the warehouse of the importer, and is so sorted and classified as to facilitate its sale, and portions thereof are sold until the pile is depleted and the remnants thereof are commingled with new shipments of the same type of timbers, also to be offered for sale, then a reasonable construction of section 10 and the decisions which have interpreted its meaning compel the termination of immunity from local taxation of such broken lots and commingled remnants of imported lumber.

The circumstances attending the shipments in question are additional reasons for concluding that the several boards or timbers were not original packages. (1) Lumber is universally bought and sold by board feet; (2) the United States Customs' method of classification of lumber is by board feet; (3) the price paid by respondent for its shipments is determined by board feet except in the

purchase of lignum vitae logs; (4) the consular certificates of origin describe the shipments by board feet, grade and variety; (5) the absence of an address from each board and the manner of transporting the lumber as an aggregation of goods,—these facts establish the folly of calling each plank an original package, and of designating the segregated and classified lumber in the bins to be in the "original form" in which it was shipped.

Respondent says that each plank was an original package because it bore individual markings which made it distinguishable "as original packages of import." Such marks merely identified the producer, who varies them for different shipments. They are put upon the boards to enable the carrier to unload the shipment without mixing the cargoes going to different importers.

The conduct of respondent in the grading of the lumber, in piling and separating it with respect to thickness at the yards, in keeping the light from the dark, in classifying it as firsts, seconds, select number 1 and common, and in passing it through two or more sorting operations "making it readily available for sale" before storing it in the bins from which it is to be sold, argues that the lumber involved in these actions had been placed in the common mass of property in Los Angeles county prior to the assessment dates in each instance and that the collection of taxes thereon did not constitute a violation of the constitutional restraint. This conclusion is emphasized by the further act of the importer in mixing the remnants of a bin remaining after sales therefrom with a new cargo of the same variety for the purpose of facilitating future sales.

Respondent endeavors to show a similarity of Brown v. Maryland to the case at bar. While there is no parallel, the Chief Justice, in disposing of Maryland's objection that the constitutional inhibition might be construed to cover sale piecemeal, announced that there is no restraint against local taxation on the import the moment such sale begins. If the importer "otherwise mixes them with the general property of the state by breaking up his packages, the tax finds the article already incorporated with the mass of property by the act of the importer. He has used the privilege he had purchased, and has himself mixed them up with the common mass, and the law may treat them as it finds them."

There is nothing said in the case of F. May & Company v. New Orleans, 178 U.S. 496, 20 S.Ct. 976, 44 L.Ed. 1165, that supports the contention of respondent. May & Co. imported merchandise from Europe. The importer made sales of packages of towels or of lace in the same parcels in which they were wrapped by the manufacturer, and contended that each of such parcels was an original package. The question for decision was whether the manufacturer's package or the box in which the packages were placed for shipment was the "original package." Both the Supreme Court of Louisiana and the United States Supreme Court held that the "original package" was that in which the goods were shipped to and received by the plaintiffs and not the smaller parcels put up by the manufacturer and packed in the box delivered to the carrier. The plaintiff argued that the importer might sell each separate package either from the box in which it was transported or from the shelves or counters in his store without being subjected to local taxation in respect of any package so brought into the country, pro-

vided such separate package be offered for sale in the form in which it was when placed in the box, case, or bale by the European manufacturer or packer. The court declared that such argument means that the power of the state to tax goods imported from other countries depends upon the particular form in which the foreign manufacturer or packer, of his own accord or by direction of the importer, has put them up in order to be sent to this country; that if such contention were the law then each article of merchandise, such as a watch done up in a separate case, would be an "original package" and could not be regarded as a part of the property of the state subject to local taxation so long as it remained in that form and unsold in the hands of the importer. It was held that when the goods placed in the hands of agents for sale, in separate parcels, have been so acted upon by the importer they have ceased to be imports and have become part of the mass of the property of the state, liable to local taxation; that the "original package" was the box or case in which the goods imported were shipped, and when the box or case was opened for the sale or delivery of the separate parcels contained in it each parcel when removed from the box "lost its distinctive character as an import and became property subject to taxation by the state as other like property situated within its limits."

There is no material difference between the facts there adjudicated and those at bar. The principle involved in the two cases is identical. While the laces imported by May & Company were inclosed in cartons by the manufacturer, they were packed in wooden boxes for the ocean journey by the packer in the employ of the manufacturer. Likewise here, after the boards, planks

and logs comprising the shipments to respondent had been sorted and arranged for sale, and especially after portions thereof had been sold and the remnants commingled in bins for further sales, they occupied the same status as the parcels of May & Company after being removed from the wooden boxes and offered for sale by the parcel. Certainly a mahogany timber containing ten board feet is as much an item of merchandise as a carton of lace, and as one of five thousand planks in a cargo it can not reasonably be termed an "original package."

The case of Anglo-Chilean Nitrate Sales Corporation v. Alabama, 288 U.S. 218, 53 S.Ct. 373, 77 L.Ed. 710, involved a shipment of 100-pound bags of nitrate. They were kept intact in a public warehouse in Mobile until removed by the ultimate consumers. It bears no resemblance to remnants of depleted cargoes of lumber sorted, classifed and stored for sale, and is otherwise not authority for exempting respondent's depleted shipments from a local tax.

Neither does it appear that the cases of Re Taxes, Pacific Guano & Fertilizer Co., 32 Hawaii 431; Low v. Austin, 13 Wall. 29, 20 L.Ed. 517, and Southern Pacific Co. v. City of Calexico, D. C., 288 F. 634, 642, shed any light upon the issue presented by the instant action. In each of those cases it is made clearly to appear that the imported merchandise was taxed after United States customs duties had been paid and while the merchandise lay in the warehouse of the importer, either in the same form in which it had been discharged by the carrier at the port or in the original packages in which it had been wrapped or crated by the shipper at the point of origin. In the Hawaii case the property taxed was phosphate

rock in bulk, kept intact in bins in a warehouse separate from the general mass of property in the territory. In the Low case the wine was stored in a warehouse of the importers "in the original cases in which the wines were imported where they remained for sale." In the Southern Pacific case the cotton had been produced, ginned and baled in Lower California. Each bale was marked or stenciled with the owner's initials and thus hauled into California and placed in the warehouse of the importer unchanged in any way until the first Monday in March, 1922, when it was assessed for taxation. The fact that the bales were further compressed "did not substantially change the form, aspect, or container of the thing imported. True it is that the cover was temporarily removed; but * * * merely for the purpose of enabling the self same article, in no wise changed in character or extent, to be compressed into a smaller space, that it might be shipped more economically."

In Mexican Petroleum Corporation v. Louisiana Tax Commission, 173 La. 604, 138 So. 117, it was merely held that the circumstance of pumping the oil into tanks of one thousand barrel capacity did not cause the liquid to lose its character as an import; that the only practical way of importing oil is in bulk; that in order to deliver the oil it may be pumped from the ship into the tanks on land, which process would not destroy its original bulk form of importation.

Respondent argues in extenso that the protection of an import from state taxation inheres in the article in its original package, citing United States v. 65 Casks, D.C., 170 F. 449; Austin v. Tennessee, 179 U.S. 343, 21 S.Ct. 132, 45 L.Ed. 224; May v. New Orleans, supra;

Champlain Realty Co. v. Brattleboro, 260 U.S. 366, 43 S.Ct. 146, 67 L.Ed. 309, 25 A.L.R. 1195, and License Cases, 5 How. 504, 12 L.Ed. 256, 258; etc. There is no question as to the soundness of the proposition. The authorities cited by respondent base their holdings upon the finding of what constituted the original package. In the 65 Casks case each cask contained 50 gallons, was marked to the consignee and if separated from the car could have been shipped alone without inconvenience. In the Austin case the cigarettes were put into pasteboard boxes, ten each. They were separately stamped and labeled. After purchase thereof the manufacturer piled upon the floor of its warehouse the number of packages sold and notified the express company to remove them. This was done by the latter company's placing the packages in one of its open baskets and transporting them to the place of business of Austin in Tennessee where the company's agent laid out the detached cigarette packages on Austin's counter. In the latter's defense it was contended that each "pack" of cigarettes was an original package as defined in Brown v. Maryland. The court in affirming the conviction for selling a "pack" in violation of a statute forbidding the sale of cigarettes said [179 U.S. 343, 21 S.Ct. 138]: "The real question in this case is whether the size of the package in which the importation is actually made is to govern; or, the size of the package in which bona fide transactions are carried on between the manufacturer and the wholesale dealer residing in different states. We hold to the latter view. The whole theory of the exemption of the original package from the operation of state laws is based upon the idea that the property is imported in the ordinary form in which, from time immemorial, foreign goods have been brought into the country. These have gone at once into the

hands of the wholesale dealers, who have been in the habit of breaking the packages and distributing their contents among the several retail dealers throughout the state. * * * No doubt the fact that cigarettes are actually imported in a certain package is strong evidence that they are original packages within the meaning of the law; but this presumption attaches only when the importation is made in the usual manner prevalent among honest dealers, and in a bona fide package of a particular size."

The Champlain case involved the question as to whether the logs of pulpwood floating down West River from a point in Vermont at the time of taxation were in transit to plaintiff's mill in New Hampshire and therefore throws no light upon the liability of respondent for local taxes on its remnants of shipments of lumber under section 10. The License Cases merely followed Brown v. Maryland in declaring an import is protected against local taxation while "in the hands of the importer for sale, in the form and shape in which they were introduced."

Respondent cites the decision of this court in Dant & Russell v. Board of Supervisors, Cal.App., 128 P.2d 389, wherein we held in conformance with respondent's contention here that the shipment of thousands of pieces of lumber did not take from one piece its character of "original package." A hearing was granted by the Supreme Court which affirmed the decision we had reversed. 21 Cal.2d 534, 133 P.2d 817. While the affirmance was based upon the theory that the mahogany taxed was a shipment in interstate traffic (from the Philippines) and for that reason not liable to state taxation, the application

for the hearing was based upon the county's claim that each board in the cargo was not an original package. The order of transfer having "blacked out" our opinion (In re Kent's Estate, 6 Cal.2d 154, 156, 57 P.2d 901) it has no authoritative value or standing in this discussion. In our defunct decision we declared that the "case of Mexican Petroleum Corporation v. City of South Portland, 121 Me. 128, 115 A. 900, 26 A.L. R. 965, * * * cited by respondent [the county] and * * * urged in the trial court * * * has been expressly disapproved as the law in this state. (See Philippine Refining Corporation v. Contra Costa County, 24 Cal.App.2d 665, 669, 76 P.2d 163 * * *)" The Maine court decision has been suggested by neither party to this action. It does not bear upon the issues. It was "decided without reference to the commerce clause" (ibid, at page 669 of 24 Cal.App.2d, at page 165 of 76 P.2d) whereas respondent herein based its action on section 10, and the issue thereby created was controverted by appellants at all stages.

[5, 6] Respondent invokes the rule (In re Bristol's Estate, 23 Cal.2d 221, 223, 143 P.2d 689) that the appellate court is powerless to upset findings if there is any substantial evidence in the record to support them. Such rule applies only to findings upon contradictory evidence or where contrary inferences can be drawn from uncontradicted proof. Where there is no conflict the finding is no more than a conclusion of law. (San Diego Trust & Savings Bank v. San Diego County, 16 Cal.2d 142, 105 P.2d 94, 133 A.L.R. 416. Findings herein were not essential to an intelligible decision. There was no witness except the assistant secretary and traffic manager of respondent. All exhibits came from respondent's files and their contents do not contradict the witness. The judgments ap-

pealed from are in a situation analogous to if not identical with one based upon stipulated facts. Therefore the "findings" are not binding upon this court. Consequently, in our discussion of the issues we have proceeded from the testimony in the reporter's transcript and the documentary exhibits. So proceeding, we have derived conclusions contrary to those reached by the trial court.

It is therefore ordered that all three judgments be and they are reversed with directions to enter judgments in favor of appellants as prayed.

McCOMB, and WILSON, JJ., concur.